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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. [redacted]400

FIFTH AND WALNUT, INCORPORATED and ALBERT J. HOFFMAN,

Petitioners,

—against—

LOEW'S, INCORPORATED, MARCUS LOEW BOOKING AGENCY, INC., RKO RADIO PICTURES, INC., PARAMOUNT PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNITED ARTISTS THEATRE CIRCUIT, INC.,

Respondents.

PETITION FOR AND BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October, 1949.

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IN THE

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OCTOBER TERM 1949

No. 192.

FIFTH AND WALNUT, INCORPORATED and ALBERT J. HOFFMAN,

Petitioners,

—against—

LOEW'S, INCORPORATED, MARCUS LOEW BOOKING AGENCY, INC., RKO RADIO PICTURES, INC., PARAMOUNT PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNITED ARTISTS THEATRE CIRCUIT, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petitioners herein pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered July 19, 1949 (R. 840), affirming the judgment of the United States District Court for the Southern District of New York (R. 2500a).

Statement of the Matter Involved

The petitioners have heretofore unsuccessfully appealed from an adverse judgment entered upon a jury verdict in a private right action initiated under the Sherman and Clayton Acts.*

The petitioners are respectively a Kentucky corporation engaged in the exhibition of motion pictures in the City of Louisville, Kentucky, where, since December, 1943, it has leased and operated a large "down-town" motion picture theatre known as the National Theatre (R. 666a, 667a) and an individual, the then owner of the fee and lessor, under a sharing arrangement, of the National Theatre (R. 666a, 667a).

Eight of the original defendants in the instant litigation were among the principal defendants in a civil anti-trust prosecution which has heretofore been argued before and decided by the United States Supreme Court *sub nomine United States of America* v. *Paramount Pictures, Inc., et al.* 334 U. S. 131.** These eight parties are generally regarded as the major motion picture distributors and exhibitors in the United States.

In addition, there were named as defendants herein The Marcus Loew Booking Agency and United Artists Theatre Circuit, Inc. (R. 11a, 12a). The former supervises and operates motion picture theatres throughout the country and is a wholly owned subsidiary of Loew's, Incorporated; the latter owns and/or operates a great many theatres throughout the country (R. 1687a). Loew's Incorporated, one of the major defendants named in the

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* Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. Section 1 and Section 2); Act of October 15, 1914, 38 Stat. 730 (15 U. S. C. Section 16).

** This case, *United States of America* v. *Paramount Pictures, Inc., et al.*, regardless of the particular phase to which reference is had, will hereinafter sometimes be referred to as *Paramount*.

original pleading herein and United Artists Theatre Circuit, Inc., indirectly but equally, owned the stock of the Louisville Operating Co. Inc., which in turn operated the Loew's and United Artists Theatre in Louisville (R. 830a, 1560a, 1561a).

It was alleged in the complaint that the major motion picture interests in this country conspired to restrain interstate trade and commerce and to effect and perpetuate a monopoly in the exhibition of motion pictures in violation of the Sherman and Clayton Acts (R. 25a) all to the damage of these plaintiffs in the operation of their National Theatre in Louisville. The conspirators included corporations not amenable to process in the Southern District of New York and thus not named as parties to this litigation.*

It was alleged that the conspiracy operated to the damage of the petitioners during the years following 1943 (R. 21a-25a); prior thereto the conspiracy did not affect the petitioners.

The efforts of the petitioners heretofore were dedicated to proving the existence of a conspiracy and the plain fact

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* Because a full understanding of the factual background herein cannot be had without identifying the non-party conspirators they are set forth herewith:

The Fourth Avenue Amusement Co., a Kentucky corporation. This corporation is an independent operator of a large circuit of theatres in Kentucky and Indiana (R. 895a). Among its Louisville theatres were two of the city's four first-run theatres, to-wit: The Rialto and Strand Theatres. The President of the corporation is Fred J. Dolle (R. 893a) who testified at length at the trial below (R. 893a *et seq.*); the Secretary of the corporation, Dennis H. Long (R. 1939a) also testified.

The Broadway and Fourth Avenue Realty Co. This corporation was the fee owner and nominal operator of the Brown Theatre (R. 895a; Exhs. 87 and 87A, R. 2252a, 2258a); the Brown Theatre during the period in issue was jointly operated as a move-over first-run theatre by three competing Louisville exhibition interests, to-wit: Louisville Operating Co. Inc., Fourth Avenue Amusement Co. and Broadway and Fourth Avenue Realty Co. (Plaintiffs' Exhs. 87, 87A, R. 2252a, 2258a).

Louisville Operating Co. Inc. See p. 3 *supra*.

that as a result of it the petitioners, to their substantial damage, were denied any opportunity to exhibit or negotiate for the exhibition of motion pictures on the favored first-run in Louisville, although their theatre, the National Theatre, was appropriately appointed, located, managed and otherwise qualified. The proof offered and received on the trial revealed that National Theatre was located in the heart of "down-town" Louisville, closest to the main intersection of the two leading business streets of the community, to-wit, Fourth and Walnut Streets (R. 125a, 201a-203a). No other theatre in Louisville was better located (Ex. 45). It was conceded that two of the four first-run theatres in the City were representative first-run theatres in terms of seating capacity, appointments and location. It was also apparent that the remaining two first-run theatres in the City suffered by comparison with the petitioners' National Theatre—especially as to seating capacity.

In proving the violation of law herein, the petitioners exposed the existence of a fixed system of runs and clearances in Louisville. Every year without exception each of the defendant distributors served the same exhibitor on a first-run in Louisville and each such exhibitor licensed the pictures of the same distributor. None of the first-run exhibitors sought either to augment or replace the product it was using with the product of any other distributors (R. 930a-934a, 1660a). None of the distributors sought to better their revenue in first-run Louisville even to the extent of making inquiries concerning possible license agreements with any theatre other than their established customers (R. 930a-934a, 1340a, 1382a, 1476a). This moratorium on competition prevailed even as to second and third run theatres. The second-run of almost all preferred films regardless of distributors was confined to the Kentucky Theatre and, similarly, in the case of third-run, to the Up-

town Theatre—operated coincidentally by the Fourth Avenue Amusement Co. (R. 2265a-2282a; Plaintiffs' Exhibits 93A-J).

It was also clear that all distributors (except Warners) acquiesced to and participated in the establishment and maintenance of the Brown Theatre as a move-over (R. 918a-919a); and all distributors knew of the joint operation of the Brown Theatre by competing first-run exhibitors (R. 925a-926a).

From September 25, 1936 until a period beyond the filing of the complaint herein, the Brown Theatre was operated pursuant to the terms of an agreement dated September 21, 1936 (R. 2252a; Plaintiffs' Exhibit 87) and renewed on September 4, 1941 (R. 2258a; Plaintiffs' Exhibit 87A). The following were parties to that agreement:

> Broadway and Fourth Avenue Realty Co. (the owner of—and prior to 1936, the operator of—the Brown Theatre);
>
> Louisville Operating Co., Inc. (a subsidiary of the respondent Loew's, Incorporated and the respondent United Artists Theatre Circuit, Inc., and the operator of the Loew's and United Artists Theatre);
>
> Fourth Avenue Amusement Co. (the operator of the Rialto and Strand Theatres).

By said agreement, the Broadway and Fourth Avenue Realty Co. employed the other two parties to it:

> "Exclusively to book and manage for party of the first part the Brown Theatre" (R. 2252a; Plaintiffs' Exhibit 87).

As payment for the services thus to be rendered, the other two exhibitors were to receive between them two-thirds of the net profits derived from the operation. Net

profits were to be calculated under a formula which made allowances to the owner of the Brown Theatre for certain enumerated operating expenses (R. 2253a; Plaintiffs' Exhibit 87). By this agreement, Louisville Operating Co., Inc. and Fourth Avenue Amusement Co. were to:

> "* * * have the right and option to exhibit in the Brown Theatre films that had been heretofore exhibited in any of the theatres operated by the second and third parties in the city of Louisville, or such first-run film as in their discretion may be designated for the Brown Theatre" (R. 2254a; Plaintiffs' Exhibit 87).

In addition, the agreement provided that:

> "The same admission price shall be charged for such films as the price charged by (Louisville Operating Co., Inc. and Fourth Avenue Amusement Co.) in the first-run theatres of such parties at the time when such films shall be exhibited in the Brown Theatre" (R. 2254a; Plaintiffs' Exhibit 87).

Fred Dolle, the President of Fourth Avenue Amusement Co., the operator of the Rialto and Strand Theatres, became the exclusive film buyer for the Brown Theatre, even for those pictures which first played at the Loew's and United Artists Theatre (R. 912a-913a). In determining which picture was to be moved over to the Brown Theatre the choice had to be exercised by Dolle. This choice became almost automatic in that for the most part the picture(s) which grossed highest during any week was moved to the Brown (R. 921a, 926a). For this purpose Dolle and Loew's, Incorporated, through its on-the-spot manager, exchanged information as to gross receipts. As Dolle testified:

"Q. In other words, you and Loew's had to exchange information on your gross receipts in order for you as operators to figure out which pictures should move-over? A. Right" (R. 921a).

Mr. Hunt, the manager of the Loew's Theatre in Louisville, testified that on instructions from his superiors, he gave Dolle the Loew's and United Artists' Theatre's receipts for this purpose (R. 1625a-1626a).

Dolle's choice of pictures would have been an idle gesture unless approved by the particular distributor of the picture.

Each of the respondent distributors with the exception of Warner Bros. actively participated in the Brown Theatre conspiracy. They did so with full knowledge of the agreement between Mr. Dolle's corporation and Louisville Operating Co., Inc. and they did so with knowledge that each of the other distributors was participating in the conspiracy. Each distributor set up a move-over with exactly the same film rental terms as did the other and they did this with the knowledge that others were doing the same (R. 916a, 918a-919a). Uncontroverted proof that each of the distributors serving the Brown Theatre knew of the existence of Exhibits 87 and 87A and the fact that the theatre was being jointly operated by competing exhibitors thereunder and knew that each was receiving the same license terms as were others is contained in the following excerpt from Mr. Dolle's testimony:

"By Mr. Stein:

Q. Now, as a matter of fact, Mr. Dolle, from time to time you bought move-over pictures at the Brown Theatre from Paramount? A. Yes, sir.

Q. RKO? A. Yes.

Q. Fox? A. Yes.
Q. Metro? A. Yes.
Q. Columbia? A. Yes.
Q. United Artists? A. Yes.
Q. Universal? A. Yes.
Q. Republic? A. Yes.

Q. And you told each one of them, did you not, the arrangement which you had with Mr. Brown and with Loew's under which the theatre was being operated? A. I told them what we were paying film rental.

Q. And you told them that the theatre was being operated under an arrangement with Loew's? A. Yes, they all knew that.

Q. You told them so, didn't you? A. Yes, sir" (R. 918a-919a).

Mr. Dolle elaborated on his negotiations with the various distributors as follows:

"Q. Mr. Dolle, in the course of your negotiations with these distributors wherein you set this standard price, did any of them ask more? A. Not to my knowledge, except the isolated cases I mentioned.

Q. They all agreed? A. They didn't all agree; they accepted it.

Q. As a matter of fact, isn't it true that you told everyone that is what you were paying? A. I think so.

Q. You told them you wouldn't pay one more than the other? A. Yes.

Q. You told them that, didn't you? A. I think so, yes" (R. 916a).

Naturally each distributor was very anxious to have the picture distributed by it which might be playing at either

the Rialto or Loew's Theatre moved over to the Brown in order to get an additional week's revenue. One of the two distributors whose pictures was being exhibited in any week had to be disappointed but a "general understanding" was worked out, whereby they all agreed to the formula which decided which picture was going to be moved over. Mr. Dolle's testimony concerning this general agreement follows:

> "Q. Each distributor was very anxious to have its pictures moved over to the Brown? A. Naturally.
>
> Q. Did you have any arrangement with any distributor whereby the pictures of that distributor if it played at the Rialto Theatre was to get a move-over at the Brown if it outgrossed the picture playing the same week at Loew's? A. You mean was that a prearranged thing or contract?
>
> Q. Either oral understanding or contract? A. I can say it was oral—I would say it was a general understanding between the distributors that were furnishing Loew's and our theaters and ourselves that the higher gross pictures would move over. That the higher gross pictures would move over.
>
> Q. That was a general understanding among all of you? A. Yes, sir" (R. 925a and 926a).

Testimony from the respondent distributors' own representatives confirms Mr. Dolle's statements concerning their general adherence to this conspiracy. The contracts for the exhibition of pictures distributed by the respondent Loew's at the Brown Theatre all contain the following legend:

> "In the event exhibitor plays any other product at higher percentage terms, then our percentage terms

are to be the same as given to such other product" (R. 923a; see Plaintiffs' Exhibit 90).

Paramount's strict adherence to this conspiracy and the importance it attached to the "general understanding" is illustrated by Exhibits 88 and 89 (R. 2262a and 2263a). Paramount's picture "Going My Way" was to be moved over from the Rialto to the Brown Theatre and the Paramount District Manager wanted an improvement in the terms for this picture over the generally accepted formula. Mr. Taylor, Paramount's Indianapolis representative, advised his home office in writing (R. 2262a; Exhibit 88) that "* * * the operation of the Brown Theatre is a complicated proposition in that both Mr. Dolle and Loew's are involved with Mr. Dolle acting as the operator and for that reason it is difficult for them to change their terms as they are the same on every picture."

Evidently, Mr. Taylor's superiors at the Paramount home office were not satisfied with his explanation on "Going My Way" so that it became necessary for Mr. Taylor to advise Mr. Donohue, one of his superiors, of the true state of affairs at the Brown Theatre, as follows:

"The operation of this house is complicated in that it is actually controlled by Loew's, who operate as a first-run opposition to the Rialto Theatre. However, the theatre is actually booked and operated by Mr. Dolle. The owner of the building is also a third party in its operation.

Mr. Dolle's contract with Loew's provides that all terms on Metro pictures held over in the Brown Theatre would be 20% to $3250., 50% over. The contract also specifically states that in the event terms other than the above mentioned are granted to any other company all pictures exhibited in the theatre belonging

> to Metro would be changed insofar as terms are concerned in keeping with other companies. Therefore, if we change the terms on *Going My Way* Mr. Dolle is going to be in a very peculiar predicament" (R. 2263a; Plaintiffs' Exhibit 89).

In further proof of the violation of law, the petitioners made an offer of proof which consisted of certain Findings of Fact and Conclusions of Law made by the United States District Court for the Southern District of New York, the Opinion and Mandate of the United States Supreme Court, and the Order entered in the District Court on that Mandate in *Paramount** (see *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323; 70 F. Supp. 53; 334 U. S. 131; R. 2102a-2103a). The offer of proof was rejected and the evidence held inadmissible (R. 2103a).

The Findings and Conclusions offered in proof dealt with four subjects:

> 1) That the "distributor-defendants acted in concert in the formation of a uniform system of clearance for the theatres to which they license their films" (Finding 81), "conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area" (Conclusions 7(b), 8(c), R. 2429a-2431a) so that "independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to

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* This offer of proof was made on June 25, 1948. On May 3, 1948, the Supreme Court handed down its opinion in the *Paramount* case which "affirmed in part and reversed in part" (R. 2101a) the judgments of the Statutory Court. The Mandate of the Supreme Court was handed down on June 2, 1948 and the order on the Mandate of the Expediting Court entered on June 25, 1948, making the Mandate of the Supreme Court the order of the Expediting Court.

which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures" (Finding 84, R. 2404a). The foregoing system of runs and clearances was found "to grant unreasonable clearance against theatres operated by * * * competitors" of the licensees of the distributor defendants (Conclusion 8(e), R. 243a) and in violation of the anti-trust laws (see also Findings 72, 73, 79, 82, 83, R. 2401a-2404a; Conclusion 8(c), R. 2431a).

2) That the defendant distributors established and maintained a price-fixing system with respect to theatre admission prices in violation of the anti-trust laws (Findings 62, 63, 64, 65, 69, 70, 71, R. 2398a-2401a; Conclusions 7(a), 8(a), 8(b), R. 2429a-2431a).

3) That the defendant distributors discriminated against small independent exhibitors and in favor of large circuits, by means of contract provisions which discriminate in favor of those circuits, in violation of the anti-trust laws (Finding 110, R. 2414a; Conclusion 8(d), R. 2431a).

4) That the "major defendants made operating agreements as exhibitors with each other and with independent exhibitors in which joint operation of certain theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein or are to be jointly determined by other means" (Finding 67, R. 2399a) thereby allying "two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the 'pool'" (Finding 113, R. 2416a). This joint operation of motion picture theatres

through operating agreements or profit sharing leases entered into between the defendants, and between the defendants and independent exhibitors, was declared to be in violation of the anti-trust laws (Conclusion 9(a), R. 2432a; see also Finding 116, R. 2416a and Conclusion 9(b), R. 2432a).

When the cause was given to the jury a number of requests to charge were submitted by the petitioners. The failure of the trial court to charge as requested and the objectionable charges given in lieu thereof are, in the view of petitioners, in error. It was the petitioners' contention below, as presently, that but for the proof of damages they were entitled to a directed verdict.* The requests to charge were predicated on the theory that petitioners were entitled to a directed verdict because of the clear and demonstrated proof that the agreement for the operation of the Brown Theatre by competing Louisville exhibitors as a move-over theatre was illegal *per se;* the requests to charge were based on pronouncements of the United States Supreme Court to that effect.

The rejection of the Findings, Conclusions and judgment in *United States* v. *Paramount Pictures, Inc., supra,* as well as the error inherent in the denial of the petitioners' requests to charge and the charges as given were presented to the United States Court of Appeals for the Second Circuit. That Court affirmed the District Court's determination on both scores. The cause was argued before the United States Court of Appeals for the Second Circuit on March 14, 1949 and the judgment was affirmed on July 19, 1949 (*Fifth and Walnut, Incorporated and Albert J. Hoffman* v. *Loew's Incorporated, et al.* (R. 829)).

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* Indeed such a motion was made at the conclusion of the case and denied (R. 2116a).

In considering the offer of the Findings of Fact and Conclusions of Law of the Expediting Court in *United States* v. *Paramount Pictures, Inc.* (D. C. S. D. N. Y., 70 F. Supp. 53), and the Opinion and Mandate of the United States Supreme Court (334 U. S. 131) Judge Clark, writing for the Court of Appeals stated:

> "The second ground on which plaintiff appeals raises an important and interesting question of law" (*Fifth and Walnut, Incorporated and Albert J. Hoffman* v. *Loew's, Incorporated* (R. 836)).

The Court then proceeded to dispose of the problem adversely and held in effect that Section 5 of the Clayton Act (15 U. S. C. A. §16), which provides that a final judgment or decree in a suit or proceeding brought by or in behalf of the United States under the anti-trust laws shall be *prima facie* evidence in particular suits, did not require the Trial Court herein to admit the Findings of Fact, Conclusions of Law and other pertinent material relating to *Paramount*, in the instant case. The rationale of the Court of Appeals was predicated on the meaning of the term "final" as that term appears in the statute.

As to the second problem which was raised before the Court of Appeals, to-wit, the inherent illegality of the joint operation of theatres by competing exhibitors, Judge Clark has ruled:

> "The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y. 70 F. Supp. 53 is not to be regarded as a declaration that joint ownership as such is illegal * * * Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a viola-

tion of the Sherman Anti-trust Act and no such decision has ever been made" (*Fifth and Walnut, Incorporated and Albert J. Hoffman* v. *Loew's Incorporated et al.* (R. 832)).

The present petition seeks to review the errors of the United States Court of Appeals for the Second Circuit in respect to each of these rulings.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, §1254.

Statutes Involved

The Act of July 2nd, 1890, 26 Stat. 209, known as the Sherman Act and the Act of October 15th, 1914, 38 Stat. 730, known as the Clayton Act, provide, in part, as follows:

"Sec. 1. Every contract combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal: * * * (15 U. S. C. A. 1).

Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * (15 U. S. C. A. 2).

* * * * *

"Sec. 5. A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof" (15 U. S. C. A. 16).

Questions Presented

1) Whether the adjudications in *Paramount* offered by petitioners are "final" within the meaning of and admissible under 15 U. S. C. §16 (Sec. 5 of the Clayton Act).

2) Whether Findings of Fact and Conclusions of Law are admissible under 15 U. S. C. §16 (Sec. 5 of the Clayton Act).

3) Whether joint operation of theatres by competing exhibitors is illegal *per se* under the decision of the United States Supreme Court in *United States of America* v. *Paramount Pictures, Inc.*, 334 U. S. 131.

4) Whether joint operation of theatres by competing exhibitors, one of which is of major stature in the industry and is a subsidiary of a major distributor, is illegal *per se* under the decision of the United States Supreme Court in *United States of America* v. *Paramount Pictures, Inc.*, 334 U. S. 131.

Reasons Relied Upon for Allowance of the Writ

1. The admissibility of the proffered *Paramount* adjudications raises, as stated by Circuit Judge CLARK in the opinion of the Court of Appeals for the Second Circuit, "an important and interesting question of law" (R. 836) which "has not been finally and authoritatively determined" (R. 837). In thus characterizing the issue of the admissibility of the *Paramount* adjudications the Court of Appeals plainly and explicitly invited this Court to consider and pass upon that issue as an important question of law which has not been, but should be settled by this Court.

The disposition of the "important and interesting question of law" here presented bears directly upon the conduct and outcome of at least 93 pending private suits, brought under Section 4 of the Clayton Act (38 Stat. 731 (1914), 8 U. S. C. A. §15), which pertain to the distribution and exhibition of motion pictures and involve claims in excess of $50,000,000.00 in damages.* For under the construction of Section 5 by the Court of Appeals for the Second Circuit those private litigants, complaining of the practices adjudged illegal in *Paramount,* cannot now offer the *Paramount* adjudications but must, instead, re-prove matter established upon the trial and affirmed by this Court in *Paramount.*** And apart from the immediate effect of this action upon pending and imminent private suits arising out of motion picture exhibition, the restrictive construction of Section 5 by the Court below impairs generally the Congressional intention that the enforcement of the anti-trust laws by private suitors should be implemented and encouraged by making available to such private litigants results obtained by the Government in criminal prosecutions and injunction actions against violators of the anti-trust laws. The instant suit, therefore, warrants review by this Court as one of "those cases whose resolution will have immediate purpose far beyond the particular facts and parties involved" (VINSON, *C.J.*, in address to 72nd Annual Con-

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* See, Letter dated July 8, 1949 from Edward C. Raftery, counsel for United Artists Corp. to the Sub-Committee of the Committee on the Judiciary, United States Senate 81st Congress, conducting hearings on S. 1910 (U. S. Government Printing Office, June 21, 1949).

** The limitation imposed by the Court below upon the availability of the *Paramount* adjudications may, in view of the consent decrees executed by some of the *Paramount* defendants, extend beyond the pending actions referred to and ultimately foreclose any private litigant, complaining of illegal restraints in the motion picture industry, from offering now or in the future the *Paramount* adjudications (see footnote to page 28, *infra*).

vention of the American Bar Association, reported in 18 U. S. Law Week 2117).

The importance of the question here posed is no greater than its novelty for, as was indicated by the Court of Appeals, this Court has not heretofore settled the precise issue presented nor has it otherwise authoritatively construed or passed upon the scope of Section 5. Indeed, the necessity for decision by this Court herein is evidenced by the fact that since the ruling of the Court of Appeals, a United States District Court, Northern District of Illinois, Eastern Division, in the Seventh Circuit has held the *Paramount* adjudications presently admissible under Section 5. *South Bend Auto Theatre Corp.* v. *Paramount Pictures, Inc., et al.* (unreported, decided on September 13, 1949 by BARNES, *D.J.*).

Moreover, the decision of the Court of Appeals for the Second Circuit as to the admissibility of the *Paramount* adjudications was in large part predicated upon the view that "the issues here left open by the Supreme Court seem to us so complex and vague that the District Court was justified in not allowing in evidence the decree or findings sought to be introduced by the plaintiffs" (R. 839) so that the decision of the Court below should impel this Court to clarify and settle the determinations made by it in *Paramount*. As the ruling of the Court below has the effect of reopening matters decided and settled by this Court upon the prior *Paramount* appeal, it is in conflict with the applicable decisions of this Court. *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451; *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Clark* v. *Keith*, 106 U. S. 464.

Accordingly, for all of the foregoing reasons, certiorari should here be granted pursuant to Rule 38(5) of the Rules of the Supreme Court on the grounds that the Court of Appeals for the Second Circuit has erroneously decided

an important question of federal law which has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the Second Circuit has ruled that "the condemnation of joint interests in the decision in *United States* v. *Paramount Pictures, Inc.*, D. C. S. D. N. Y. 70 F. Supp. 53 is not to be regarded as a declaration that joint ownership as such is illegal". The Court of Appeals has further ruled that "no such decision has ever been made".

In thus ruling, the United States Court of Appeals for the Second Circuit fails to distinguish between joint *operation* of theatres by two or more competing exhibitors and joint *ownership* of theatres by two or more competing exhibitors. The decision of the District Court in *Paramount* treated these problems separately and the United States Supreme Court did likewise. The District Court in *Paramount* held operating agreements "to be in clear conflict with the Sherman Act" and stated that "the effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the 'pool' ". The United States Supreme Court has affirmed the inherent illegality of such arrangements for the joint operation of motion picture theatres and has held that "the practices were bald efforts to substitute monopoly for competition". Indeed, the District Court and the United States Supreme Court in *Paramount* have held that joint ownership of motion pictures is illegal *per se* except where one of those whose interests are thus joined is not an exhibitor but a mere investor and except where one of those whose interests are thus joined owned so slight a share of the joint venture as to be discounted. The operation of the Brown Theatre, whether considered an instance of joint operation or of joint ownership, is an instance of

the alliance of competing exhibitors held illegal *per se* in *Paramount* so that the rulings of the United States Court of Appeals for the Second Circuit on these questions, being in square conflict with the decision of this Court in *United States of America* v. *Paramount Pictures, Inc.*, 334 U. S. 131, commend themselves to review by this Court.

There has been but one judicial construction of this phase of the decision of the United States Supreme Court in *Paramount* other than that in the instant case. In an unreported decision, the United States District Court for the District of Columbia, *sua sponte* has dismissed a complaint and a counterclaim predicated on an agreement for the joint operation of a motion picture theatre by two or more competing exhibitors,—stating that such an agreement is illegal *per se*. *Kogod & Burka* v. *Stanley Company of America* (In the United States District Court for the District of Columbia, Civil Action No. 2508-48 decided June 29, 1949, unreported). Thus, the authorities construing the meaning of *United States of America* v. *Paramount Pictures, Inc.*, are in conflict. These conflicting authorities are found in different Circuits and there is a potential conflict in the Courts of two different Circuits. This conflict should be resolved by the United States Supreme Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

FIFTH AND WALNUT, INCORPORATED
ALBERT J. HOFFMAN
Petitioners

MONROE E. STEIN
Attorney for Petitioners

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ROGGE, FABRICANT, GORDON & GOLDMAN
HERBERT J. FABRICANT
MURRAY A. GORDON
MAURICE A. GELLIS
Of Counsel

In the

Supreme Court of the United States

October Term 1949

No. 192

Fifth and Walnut, Incorporated and Albert J. Hoffman,

Petitioners,

—against—

Loew's, Incorporated, Marcus Loew Booking Agency, Inc., RKO Radio Pictures, Inc., Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Distributing Corporation, Columbia Pictures Corporation, United Artists Corporation and United Artists Theatre Circuit, Inc.,

Respondents.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The Opinion of the United States Court of Appeals for the Second Circuit (R. 829) is unreported.

Jurisdiction

The basis for this Court's jurisdiction is set forth in the petition at page 15.

Specification of Errors

1. The Court below erred in refusing to admit in evidence the Findings of Fact and Conclusions of Law in *Paramount* which were offered by the petitioners (R. 2101a-2103a) since:

(a) The said Findings and Conclusions were final within the meaning of and admissible under Section 5 of the Clayton Act.

(b) The said Findings and Conclusions were relevant and material to the issues involved in this case.

2. The Court below erred in refusing to hold and charge for the plaintiffs against all the defendants except Warner Bros. Pictures Distributing Corp. that the said defendants were parties to the joint operation by competing exhibitors of the Brown Theatre in Louisville either as parties to the contracts of joint operation (Exhibits 87, 87-A) or by wilful and knowing adherence to the said arrangement with knowledge of the aforesaid contracts and of the conduct of the other defendants herein with respect thereto and that said agreement and conduct were illegal *per se*.

Summary of Argument

Under Section 5 of the Clayton Act petitioners are authorized to offer those *Paramount* determinations which constitute a final judgment or decree. The *Paramount* Findings of Fact and Conclusions of Law offered by petitioners were, in terms, affirmed by this Court and thereby finalized. They are no longer subject to review or disturbance by the Expediting Court or any other court. As Congress expressly intended Findings of Fact and Conclusions of Law

thus finalized to be admissible pursuant to Section 5 of the Clayton Act, it was error for the Court of Appeals to affirm the refusal by the Trial Court to admit in evidence the *Paramount* determinations offered by petitioners. That error was prejudicial in that the *Paramount* determinations offered were relevant and material; indeed, under the circumstances of this case, if those determinations had been admitted in evidence, a verdict for the plaintiffs would have resulted. The instant case is an appropriate occasion for reviewing and reversing the prejudicial error thus committed below, for, as stated by the Court of Appeals in the opinion below, the instant case raises "an important and interesting question of law * * * [which] has not been finally and authoritatively determined, * * *" (R. 836, 837).

The Brown Theatre was operated pursuant to a written agreement by three competing Louisville exhibitors, to wit: Fourth Avenue Amusement Co., The Broadway & Fourth Avenue Realty Co. and Louisville Operating Co. Inc. (a subsidiary of Loew's, Incorporated. The defendant distributors, with knowledge of this written agreement, joined the conspiracy by uniformly servicing the Brown Theatre on a move-over run from three competing theatres. The Court of Appeals erred in refusing to hold that this agreement and this arrangement for the operation of the Brown Theatre and the servicing of pictures to it were illegal *per se*, for in such refusal the Court of Appeals rejected the holding of this Court in *Paramount* that any joint operation of a theatre by competing exhibitors is illegal *per se*.

ARGUMENT

POINT I

It was error for the Court of Appeals for the Second Circuit to affirm the ruling of the Trial Court excluding the adjudication in *Paramount* offered by petitioners.

Upon the trial petitioners offered the mandate of this Court and the order entered thereon in *Paramount** as a "judgment or decree" to be admitted as *prima facie* evidence under Section 5 of the Clayton Act. As part of the *Paramount* judgment, and in order to define and limit the offer to relevant matters affirmed and finalized by this Court, petitioners also offered certain of the *Paramount* Findings of Fact and Conclusions of Law as well as the opinion of this Court in *Paramount*. The foregoing adjudications, obtained by the United States against most of the respondents herein after ten years of litigation, were offered under Section 5 of the Clayton Act which was enacted in order to make available to private litigants evidence established by the Government in proceedings against violators of the anti-trust laws. The issue upon the instant petition arises from the circumstance that at the time of the trial herein not all phases of the *Paramount* litigation had completely terminated; the petitioners' offer was made directly after this Court had affirmed in part and reversed in part the judgment of the Expediting Court and had remanded the proceedings to that Court. Petitioners contend that the matter thus affirmed by this Court

* The decree of the Expediting Court, which is incorporated by reference in the mandate (R. 2494a), was thereby submitted by petitioners upon the trial.

in *Paramount* and offered by the petitioners upon the trial is admissible under Section 5; respondents contend and the Courts below have held that the adjudications offered do not constitute a "final judgment or decree" within the meaning of Section 5. The resolution of the stated issue will determine whether the petitioners, and many other exhibitors who have suffered from the monopolistic practices and illegal restraints practiced by respondents, will now or ever be entitled to introduce as proof the judicial determinations obtained by the Government against these respondents after many years of laborious investigation and litigation.

A

The *Paramount* adjudications offered by petitioners are "final" within the meaning of Section 5.

The opinion of the Court of Appeals concluded that *Paramount* had yielded no admissible "final judgment or decree" on the ground that issues, other than those resolved by the Findings of Fact and Conclusions of Law offered by petitioners, remain open and undecided after the decision of this Court in *Paramount* (R. 839). Petitioners respectfully submit that the Court below thereby engaged in an inquiry inappropriate to the correct interpretation and application of Section 5. The inquiry should have been whether that portion of the *Paramount* judgment or decree offered by petitioners, as particularized by the designated Findings of Fact and Conclusions of Law, were final within the meaning of Section 5 and not whether there has been a final judgment or decree with respect to other, separate matters not relevant to this case or relied upon by petitioners. If that portion of the Paramount judgment or decree offered by petitioners was finalized by

this Court and subject to no alteration by the subsequent *Paramount* proceedings, petitioners and others ultimately entitled to the benefits of the affirmed *Paramount* adjudications under Section 5 should not be required to await the final termination of those proceedings particularly in view of the prospect that such a final termination, if ever achieved,* is years in the offing.

The circumstance that the remand in *Paramount* creates the possibility of other orders, judgments and decrees in the same action does not affect the finality of those matters which have been concluded. For "a decree in equity is not a single indivisible thing like the ordinary judgment at law. It frequently incorporates several distinct matters." *Gloucester Water Supply Co.* v. *Freeman,* 211 Fed. 349, 353. An equity decree or order on any one of several distinct and separate matters may be a final decree without regard to the status of the other matters in litigation. *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541; *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411, 414. A "final judgment or decree" is not the single "last judgment or decree" which, in point of time, is entered in an equity suit; a "final judgment or decree" is any judgment or decree which settles the subject matter thereof and the finality thereof is in no wise affected by the pendency of other matters in the same action. *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362; *Belmont Bridge* v. *Wheeling Bridge,* 138 U. S. 287; *Bee Machine Co.* v. *Freeman,* 131 Fed.

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* *Quaere* whether *Paramount* would ever be thus concluded if, as is often the case, the Expediting Court reserves jurisdiction in the decree. Similarly *quaere* whether the proviso in Section 5 ("This Section shall not apply to consent judgments or decrees entered before any testimony has been taken") may have the effect of precluding petitioners and others from ever offering any of the *Paramount* adjudications against those of the *Paramount* defendants who entered into consent decrees after the decision of this Court and before the Expediting Court took evidence on the remand.

2d 190, aff'd. 319 U. S. 448; *Cleveland* v. *Second National Bank & Trust Co.*, 149 F. (2d) 466, *cert. den.*, 326 U. S. 775. As reported in Restatement, *Judgments* §41, comment c, the rule is:

> "A judgment may be final as to some matters in litigation, although the litigation continues as to other matters. Thus, if in a bankruptcy proceeding a claim is made against the bankrupt and the court makes a final determination as to the claim, this is a final judgment although the bankruptcy proceeding is not terminated. So also, in an accounting proceeding involving many items the parties may agree that certain items shall be separately litigated. A judgment rendered with respect to these items may be a final judgment, although the litigation as to the other items is not terminated."

More succinct is the observation

> "* * * even an interlocutory judgment is res judicata with respect to those matters as to which no further judgment may be made; * * *" Freeman, *Law of Judgments* (5 ed. 1925), vol. 2, §717, p. 1515.

In the last analysis the term "final judgment or decree" in Section 5, as many other terms in law, obtains its meaning from the context in which and the purpose for which it is used.

> "No hard-and-fast definition of 'final' judgment, applicable to all situations, can be given since its finality depends somewhat upon the purpose for which and the standpoint from which it is being considered, since it may be final for one purpose and not for another." Freeman, *Law of Judgments* (5 ed. 1925), vol. 1, §27, p. 45.

Only recently this Court held that the question whether "a determination is final" is to be ascertained by a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546. Any inquiry into the meaning of "final judgment or decree" as employed in Section 5 must therefore begin with and defer to the purpose of that Section as stated by President Wilson:

> "It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of." (51 *Cong. Rec.*, Pt. IX, p. 9090.)

Accordingly, while it may be appropriate that a judgment or decree by an inferior court subject to reversal or modification by an appellate court be held not to be a "final judgment or decree" within the meaning of Section 5 (*Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, aff'd 119 F. (2d) 747, *cert. den.* 314 U. S. 644; *Duluth Theater Corp.* v. *Paramount Pictures*, 74 F. Supp. 625)*, "It is not fair that the private litigant should be obliged to set up and establish again" those matters conclusively settled by the highest appellate tribunal. Such matter should be deemed "final" irrespective of whether other severable issues remain pending. So long as the adjudications offered are

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* The Court of Appeals cited the decisions of Judge Nordbye in the *Twin Ports* and *Duluth* cases in support of its construction of Section 5 (see R. 838). It is therefore significant that, in defining the degree of finality required by Section 5, Judge Nordbye designated as final matters finalized "by reason of an affirmance of the appeal by the court of last resort" (*Twin Ports Oil Co.* v. *Pure Oil Co.*, *supra*, at p. 369). Neither the *Twin Ports* nor *Duluth* cases are authority for the proposition for which Judge Clark cited them since both pertain to judgments by a court of inferior jurisdiction prior to the expiration of the time to appeal and prior to affirmance by a court of last resort.

not subject to disturbance or resettlement, the private suitor need not await the final termination of a litigation which promises to endure many more years and thereby assume the risks to a law suit which always attend the passage of time.

It is true Section 5 tolls the statute of limitations, so far as a private litigant is concerned, during the pendency of a suit by the Government.* But the statute of limitations is obviously not the only prejudice or hardship suffered by a litigant as a result of the passage of time. The tolling of the statute of limitations by Section 5 should define the latest date when the private suitor may initiate his action, not the earliest. Where the adjudications offered are, as here, settled and final and will be the same in nature and content at the conclusion of the litigation as they are when offered, then "a practical rather than a technical construction" of Section 5 would preclude delaying the applicability of Section 5 until the distant, final termination of all phases of the *Paramount* proceedings. Accordingly, even after the decision herein by the Court of Appeals, it was held by Judge Barnes of the United States District Court of Illinois in *South Bend Auto Theatre Corp.* v. *Paramount Pictures,*

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* As the second paragraph of Section 5 tolls private actions "during the pendency" of government actions or prosecutions, the Court of Appeals concluded, "it would seemingly follow" that the expression "final judgment or decree" in the first paragraph of Section 5 contemplated "that the [government] suit should no longer be 'pending'." (R. 838). If it were intended thus to identify the separate paragraphs of Section 5—each of which serves a distinctly different function—the Congress would have used more appropriate language therefor; thus Section 5 does not, in terms or otherwise require the private litigant to await the time when the government suit or proceeding is "no longer * * * pending" before he may submit in evidence a judgment or decree obtained by the government. Indeed, the Court below patently was not convinced that Section 5 is limited to government suits "no longer * * * pending" since it would admit "the decree and findings" made in a pending government suit where "an appellate court had gone so far as clearly to dispose of practically all the issues involved" (R. 839).

Inc., et al. (decided on September 13, 1949) that the *Paramount* adjudications are presently admissible under Section 5.

The error committed below comes more clearly into focus when the decision of this Court in *Paramount* is viewed. For this Court in its opinion considered and adjudicated separately and distinctly each of the following: (I) the alleged restraints of trade; (II) the relief provided in the decree with respect to those restraints; (III) the alleged monopoly and the relief recommended therefor; (IV) the provision for arbitration in the decree of the Expediting Court; and (V) the motions for leave to intervene. Petitioners have relied upon and offered in evidence only those determinations which were passed upon and affirmed in the first portion of the opinion of this Court, *i.e.*, the determination by the Court that the evidence sustained the Findings and Conclusions that the respondents herein committed restraints of trade, in violation of the anti-trust laws, by means of fixing maximum admission prices (R. 2448a-2451a); by the maintenance of a fixed, unreasonable, arbitrary and uniform system of clearances and runs (R. 2451a-2456a); by entering into pooling agreements for the joint operation of theaters (R. 2456a-2461a); and by means of discrimination against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions (R. 2468a-2470a).

As to the price-fixing conspiracies found by the Expediting Court, this Court declared that the record "plainly established" a horizontal price-fixing conspiracy between all the defendants and that "there was adequate foundation" for the finding that there was a vertical price-fixing conspiracy between each distributor defendant and its licensee (R. 2449a). The Court adjudged both these conspiracies in violation of the anti-trust laws.

Similarly, this Court concluded that as to the Finding of the Expediting Court that respondents maintained a fixed, unreasonable, arbitrary and uniform system of runs and clearances:

> "The evidence is ample to show, as the District Court plainly demonstrated, see 66 F. Supp. pp. 343-346, that many clearances had no relation to the competitive factors which alone could justify them. The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. The evidence is ample to support the findings of the District Court that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence. That evidence, like the evidence on the price-fixing phase of the case, is therefore adequate to support the finding of a conspiracy to restrain trade by imposing unreasonable clearances" (R. 2453a-2454a).

This Court left no doubt as to its determination—and indeed as to the finality of its determination—that the pooling arrangements, such as that entered into by certain of the respondents for the joint operation of the Brown Theatre (and acquiesced to and joined in by the other respondents), were engaged in by the parties thereto and that such arrangements run afoul of the anti-trust laws.

> "*These provisions of the decree will stand.* The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competi-

tors on their side. Clearer restraints of trade are difficult to imagine" (R. 2457a) (emphasis added).

The Findings and Conclusions as to the discriminatory practices whereby respondents herein favored larger circuits at the expense of independent exhibitors such as petitioners were also affirmed.

"These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns" (R. 2469a).

While this Court affirmed in the foregoing respects, it did reverse the Expediting Court in other respects which are separate and distinct from the adjudications which petitioners offered upon the trial. The Court remanded for "further findings" as to the disaffiliation of joint ownership between exhibitor defendants and independents. The Court also remanded the question of franchises; the competitive bidding provision of the decree; and the question of exhibition monopoly by the exhibitor defendants. The petitioners are not relying upon and did not offer for proof any part of the judgment or decree which is connected with those matters remanded to the Expediting Court.

This Court did not, by remanding the cases to the Expediting Court, thereby intend to reverse, or in fact reverse, or otherwise affect the balance of the Findings of Fact or Conclusions of Law of the Expediting Court. Thus, Mr. Justice Douglas stated:

"The competitive bidding system was perhaps the central arch of the decree designed by the District Court. Its elimination may affect the cases in ways other than those which we expressly mention. Hence on remand of the cases the freedom of the District Court *to recon-*

sider the adequacy of the decree is not limited to those parts we have specifically indicated" (R. 2476a) (emphasis added).

The Court remanded the determinations made upon the restraints of trade complained of by petitioners herein only with respect to "the adequacy of the decree" in connection with molding the proper relief therefor; the Court did not by its opinion or otherwise disturb or leave open or undecided the affirmed Findings of Fact or Conclusions of Law offered by petitioners as to those restraints of trade. Accordingly, the Court concluded:

"The judgment in these cases is affirmed in part and reversed in part, and the cases are remanded to the District Court for proceedings in conformity with this opinion" (R. 2490a).

The mandate of this Court does not deviate from the final clause of the opinion. The mandate provides:

"It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, affirmed in part and reversed in part";

and the mandate further orders:

"that this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of New York for further proceedings in conformity with the opinion of this Court" (R. 2495a).

Those determinations proferred by petitioners are the settled law of the case in *Paramount* as established by

this Court. To attribute a lesser status to the decision of this Court would be to render the major portion of the Court's opinion *obiter dicta.* For if it was not intended by the Court to settle finally and conclusively the Findings and Conclusions expressly affirmed in the opinion and not remanded to the Expediting Court, this Court could have ruled just on the Findings and Conclusions or the portions of the decree remanded. The careful analysis of the Findings and Conclusions which were affirmed may not be considered as idle and futile.

The circumstance that other, separate portions of the determinations of the Expediting Court were reversed and remanded does not alter the conclusion that the affirmed and finalized determinations offered by petitioners are no longer the subject of inquiry in further proceedings in *Paramount.* In *Thompson* v. *Maxwell Land Grant Co.,* 168 U. S. 451, 456, Brewer, *J.,* stated for the Court:

> "It is the settled law of this Court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Supervisors* v. *Kennicott,* 94 U. S. 498, and cases cited in the opinion; *Clark* v. *Keith,* 106 U. S. 464; *Chaffin* v. *Taylor,* 116 U. S. 567; *Northern Pacific Railroad* v. *Ellis,* 144 U. S. 458; *Great Western Telegraph Company* v. *Burnham,* 162 U. S. 339, 343."

Similarly it was held in *In Re Sanford Fork & Tool Co., Petitioner,* 160 U. S. 247, 255, 259:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever

was before this Court, and disposed of by its decree, is considered as finally settled" (p. 255).

* * * * *

"It must be remembered, however, that no question once considered and decided by this court, can be reexamined at any subsequent stage of the same case" (p. 259).

See also:

Messinger v. *Anderson,* 171 Fed. 785, 790.

In view of the "settled law" of this Court "that whatever has been decided on one appeal * * * cannot be reexamined on a second appeal * * * in the same suit", it may be anticipated that the matters already settled in *Paramount* will not be disturbed upon any subsequent appeal. The Expediting Court is, of course, bound by "everything decided, either expressly or by necessary implication" (*Munro* v. *Post,* 102 F. (2d) 686, 688; see also R. 1273a) by the Supreme Court and in its recent opinion, July 25, 1949, following the remand of the Expediting Court treated as settled and final those matters which this Court affirmed (not yet reported). As to the finality of those matters affirmed by this Court and offered by petitioners attention is directed to the consent decrees entered into between certain of the respondents and the Government and approved by the Expediting Court subsequent to the remand from the Supreme Court. It is therein expressly stated that only some of the "issues and matters" in *Paramount* remain "open upon the

remand"*; if any "issues and matters" do not remain open, they must include the determinations affirmed by the Supreme Court and offered by petitioners.

As this Court affirmed and finalized those determinations offered by petitioners—determinations severable and distinct from those remanded—it has rendered a "final judgment or decree", as to those matters, which would bind the parties thereto as *res adjudicata* in any other action between the parties thereto. Section 5 subrogates petitioners to the rights the Government might have as against respondents as to matters which are *res adjudicata* in *Paramount* and it was therefore error to exclude the evidence offered.

B

Findings of Fact and Conclusions of Law are admissible under Section 5.

Although the Court below purports to have reached its decision upon the ground that the *Paramount* suit had not reached that point of finality required under Section 5 without inquiring into the question "how much and what

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* See, *e.g.*, Consent Decree, filed in the Southern District of New York in Equity No. 87-273 as to "R. K. O. Defendants" at page 2:

> "The RKO defendants having consented to the entry of this decree before the taking of any testimony upon the issues and matters open upon the remand of this cause, and without any findings of fact upon such issues and matters, and upon condition that neither such consent, nor this decree, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being an admission or adjudication or evidence that the allegations of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true in so far as they relate to the issues and matters so open, or that the RKO defendants, or any one or more of them, have or has violated or are or is violating any statute or law with respect to the issues and matters so open."

Similar language appears in the decrees entered into between the Government and Paramount Pictures, Inc.

portion" of the *Paramount* proceedings are admissible (837), upon analysis it appears that that decision is ultimately based upon the inarticulated premise that Findings of Fact and Conclusions of Law are not admissible. For when the Court below considered the litigational status of *Paramount* it did not examine the finality of that portion of the *Paramount* "judgment or decree" defined by the particular *Paramount* Findings of Fact and Conclusions of Law offered by petitioners but, instead, examined into the stage of finality reached in the *Paramount* action as a whole. If, as petitioners contend, Findings of Fact and Conclusions of Law which have been finally determined are admissible under Section 5, then it was unnecessary and irrelevant to ascertain the extent to which there remain open and pending other matters in *Paramount*. It is therefore decisive that Findings of Fact and Conclusions of Law are admissible under Section 5 not only because they are properly part of the "judgment or decree" in an anti-trust action but also because their admissibility is indispensable if anti-trust adjudications are to be meaningful as evidence.

This Court has heretofore indicated in *Paramount* that it considered the Findings of Fact and Conclusions of Law therein to be a part of the judgment of the Expediting Court. The opinion of this Court in *Paramount* commences with the statement:

> "These cases are here on appeal from a judgment of a three-judge District Court holding that the defendants had violated §1 and §2 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. A. §§1, 2, and granting an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53" (R. 2446a; 334 U. S., 140).

The *Paramount* decree, however, contains no expression that the respondents violated the anti-trust law; the "judg-

ment of" the "three-judge District Court holding that the defendants have violated §1 and §2 of the Sherman Act" is contained instead exclusively in the Findings and Conclusions. The decree is restricted to "granting an injunction and other relief". Implicit in the language of this Court in *Paramount* is the view that a "judgment" in an anti-trust case consists not only of the prohibition against future illegal conduct and the restraining of the continuation of past illegal conduct on the part of the defendants (the decree in *Paramount*), but also of the findings of past illegal conduct on the part of the defendants upon which such prohibitions and restraints are founded.

The history of Section 5 confirms that the statute contemplates the admission of Findings and Conclusions in providing for the admission of a judgment or decree. As previously indicated, the message of President Wilson which led to the enactment of Section 5 states the intent was to make available to the private litigant "the facts which the Government has proved" (51 Cong. Rec., Pt. IX, p. 9090). In purported fulfillment of this intent, the bill as originally reported out of the Judiciary Committee provided:

> "That whenever in any suit or proceedings in equity hereafter brought by or on behalf of the United States under any of the anti-trust laws there shall have been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has not monopolized, any part of commerce, in violation of any of the anti-trust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding

> an estoppel as between the United States and such defendant, constitute in favor of or against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the anti-trust laws." *H. R. Report* 627, 63rd Cong., 2d Sess. (1914), Majority Report, p. 2.

That proposed language was criticized by the minority report of Representatives Nelson and Volstead on the grounds that while the private litigant was allowed thereby to utilize findings in a Section 1 or Section 2 suit, it failed to "permit private parties to make use of the facts and findings in suits brought by the Government, in accordance with Section 13 of this Act*". *H. R. Report* 627, 63rd Cong., 2d Sess. (1914), Minority Report, p. 5. The portion of the proposed bill thus limiting the use of "facts and findings" was omitted in the final draft.

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* The matter quoted in the text was contained in the following paragraph:

> "It does not permit private parties to make use of the facts and findings in suits brought by the Government, in accordance with Section 13 of this Act, for violations of any of its provisions. The decrees which private parties may make use of in their suits for damages are described as being 'to the effect that a defendant has or has not entered into a contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, or has or has not monopolized or attempted to monopolize, or combined with any person or persons to monopolize, any part of commerce, in violation of any of the anti-trust laws'. In other words the decrees which private parties may plead in damage suits which they may bring against trusts as res judicata are decrees secured in Government suits brought under the Sherman law. Where the decree secured by the Government is to the effect that a trust has discriminated in price between different communities or individuals or that it has entered into exclusive contracts, private parties are not allowed to plead such findings as res judicata in any damage suits which they may bring under this Act."

The debates on Section 5 indicate further the Congressional understanding that Findings and Conclusions would be admissible as part of the judgment or decree. Representative Floyd stated that under the statute the private suitor would be armed "with all proofs furnished by the Government in that suit of wrongful acts * * *" (51 *Cong. Rec.* 9490). And in the Senate, when Senator Cummins was dubious as to the help provided a private litigant by the present Section 5 because

> "when the things forbidden * * * is a long series of acts and combinations and incorporations * * * I think he will have to show the thing by which he was hurt as a violation of the antitrust law, and in nine cases out of ten the decree does not adjudge that that particular thing was a violation of the antitrust law" (51 *Cong. Rec.* Pt. XIV, p. 13901).

Senator Walsh responded:

> "* * * I assume that in all of these cases findings of fact are made * * * [and if not] the rule of implied findings would apply" (*ibid.*).

Indeed, at the time when Section 5 was drafted it was the practice to include Findings of Fact and Conclusions of Law in anti-trust decrees (see, *e.g., United States* v. *Eastman Kodak Co.*, 230 Fed. 522, 524). The collation of all anti-trust decrees obtained by the Government in civil actions prior to 1918 found in "Decrees and Judgments in Federal Anti-Trust Cases, July 2, 1890–January 1, 1918" (Government Printing Office, 1918) pages 1-672, demonstrates the existence of that invariable practice. Consequently, by allowing the introduction of a "judgment or decree", Section 5 thereby provided for the introduction

of Findings of Fact and Conclusions of Law. This was the understanding of the Congress when it passed Section 5 of the Clayton Act.

The admissibility of Findings of Fact and Conclusions of Law is here in issue only because of the recent tendency in anti-trust cases, manifested in *Paramount*, to separate the decretal portion of the judgment from the Findings and Conclusions. Respondents have urged that petitioners and others may offer, at most, only the decree in view of the language in Section 5 which refers to the admissibility of a "judgment or decree".

To read and to consider Section 5 literally so as to comprise only that portion of an adjudication, obtained by the Government, which is designated as the decree would be to render Section 5 a nullity. For a decree in an equity action, and particularly in an anti-trust suit, dedicated to defining the remedial action ordered by the court is usually concerned with prospective events. Except by way of prefatory recital, such a decree usually does not specify the illegal conduct or acts upon which it is founded. If such a decree alone is the evidence contemplated by Section 5, the statute provides the private litigant and the jury with the least revealing and demonstrative aspect of the adjudication obtained by the Government. It is hardly to be supposed that the Congressional objective in the enactment of Section 5 is most efficiently subserved by defining the evidence admissible under Section 5 as the instrument which spells out of the injunctive or other relief and which is known as the "decree" in *Paramount*.

The whole intent of Section 5 is—and, indeed, the only logical reason for Section 5 can be—to enable a plaintiff in a private anti-trust action to put before the trier of fact the adjudication of illegal conduct on the part of the defendants made in either a civil or a criminal action brought

by the Government.* Congress in passing Section 5 did not conceive that there would be any aid to private suitors by the provisions of the decree in *Paramount* which forbid future illegal conduct on the part of the respondents. Congress did intend by Section 5 to strengthen the Clayton Act and to aid private litigants to enforce their rights thereunder by permitting the said private litigants, such as the petitioners herein, to introduce Findings of illegality, such as are contained in the Findings and Conclusions in *Paramount,* in private suits. As it has been held without exception that Findings of Fact, Conclusions of Law, court opinions, the evidence, pleadings, and even matter *aliunde* the litigation may and must be examined to determine the matters comprised by a judgment in its operation as an estoppel (*Miles* v. *Caldwell,* 69 U. S. 35; *Washington, Alexandria & Georgetown S. P. Co.* v. *Sickles,* 65 U. S. 333; *Cromwell* v. *County of Sac,* 94 U. S. 351; *Russell* v. *Place,* 94 U. S. 606; *Last Chance Min. Co.* v. *Tyler Min. Co.,* 157 U. S. 683; *Forsyth* v. *Hammond,* 166 U. S. 506; *Oklahoma* v. *Texas,* 256 U. S. 70; *Thompson* v. *Maxwell Land Grant Co.,* 168 U. S. 451, 456; *Bee Mach. Co.* v. *Freeman,* 131 F. (2d) 190, 193, *aff'd* 319 U. S. 448; *The Evergreens* v. *Nunan,* 141 F. (2d) 927, 928 (L. Hand, *J.*)), it is plain that when Congress defined the scope of admissibility in Section 5 as those "matters respecting which said judgment or decree would be an estoppel as between

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* It has been expressly held that Section 5 is not applicable to all final judgments and decrees but only to "a judgment which in effect is tantamount to a finding that there has been a violation of the Sherman Anti-Trust Act" (*Twin Ports Oil Co.* v. *Pure Oil Co.,* 26 F. Supp. 366, 378, aff'd 119 F. (2d) 747, *cert. den.* 314 U. S. 644), thus confirming petitioners' contention that the matter admissible under Section 5 is determined not by considerations of technical nomenclature but according to whether that matter constitutes an adjudication of illegality.

the parties thereto", Congress not only permitted but required the admission of Findings and Conclusions to render the decree or judgment meaningful as an estoppel.*

C

The Court of Appeals committed prejudicial error when it affirmed the ruling of the Trial Court.

The materiality and relevancy of the offered *Paramount* determinations to the instant action establishes the prejudice occasioned petitioners by the rulings complained of.

1. The relevancy of the *Paramount* adjudications offered by petitioners.

Petitioners were confronted with—and complained of—the conspiracy among the respondents resulting in a system of fixed runs and clearances in Louisville, and the concommitant conspiracy to fix minimum admission prices in Louisville, which precluded petitioners from obtaining first runs from any of the respondents (*cf. Paramount* Findings 62, 63, 64, 65, 69, 70, 71, R. 2398a-2401a; Conclusions 7(a), 8(a), 8(b), R. 2429a-2431a). And the Expediting Court's determination as to discrimination by the respondents herein against independent exhibitors in favor of larger circuits (Findings 79, 82, 83, 84, R. 2403a-2404a;

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* *Cf. Eastman Kodak Co.* v. *Southern Photo Material Co.*, 295 Fed. 98, cert. den. 264 U. S. 597, aff'd 273 U. S. 359, where it was held that a decree obtained in a prior action brought by the Government against an infractor of the anti-trust laws was admissible in a subsequent damage suit by a private litigant against the same offender and, further, that under Section 5:

> "We think the pleadings were properly admitted to explain the issues upon which the decree was based. We agree that the opinion of the District Court should not have been admitted, but we think the error was harmless, in view of the fact that the court limited the effect of this evidence to the decree, * * *" (195 Fed. 101-102).

Conclusions 7(b), 8(c), 8(e), R. 2429a-2431a) is relevant to the allegations and proof submitted by petitioners in connection with paragraphs 38 (R. 25a-26a), 48 (R. 31a-32a) and 49 (R. 32a) of the complaint. Finally, the adjudication in *Paramount* that the respondents herein have entered into pooling arrangements or agreements between themselves and between themselves and independent exhibitors for the joint operation of theaters and that such joint operation is illegal and in violation of the anti-trust laws (Findings 67, 110, 113, 116, R. 2399a, 2414a, 2416a; Conclusions 8(d), 9(a), 9(b), R. 2430a, 2432a), is manifestly an adjudication of the illegality of the method whereby the Brown Theater was operated—and to a slightly lesser extent of the method whereby the Rialto, Strand and Loew's and United Artists' Theaters were allied through their joint use of the Brown Theater as a move-over run from both of them.

The Court of Appeals noted but did not decide the question whether the Findings and Conclusions, which do not directly refer to the situation in Louisville, Kentucky, are "relevant to the local controversy here presented" (R. 837). Anti-trust suits brought by the Government usually treat the nationwide aspects of the offending monopoly or illegal restraint. If determinations of nationwide illegal restraints or monopolies are not available to a private litigant under Section 5, then the effectiveness of Section 5 would be reduced as the scope of Government suits increased. Moreover, since the whole includes any part thereof, a determination of a nationwide restraint or monopoly should be admissible to prove a local restraint or monopoly. Indeed if the provisions of Section 5 come into play only where the private suit involves the identical fact situation litigated in a prior action by the Government, then that Section would be largely superfluous since under the ordinary rules of evidence a prior determina-

tion of guilt in a criminal prosecution is admissible in a subsequent private action against the same offender where the private action puts in issue the subject matter of the criminal prosecution. *Burt* v. *Union Central Life Insurance Co.*, 187 U. S. 362; *New York Life Ins. Co.* v. *Murdaugh*, 94 F. (2d) 104; *Diamond* v. *New York Life Ins. Co.*, 50 F. (2d) 884; *Greenfield* v. *Tuccilo*, 129 F. (2d) 854; *Austin* v. *United States*, 125 F. (2d) 816; *United States* v. *DeAngelo*, 138 F. (2d) 466; *Schindler* v. *Royal Insurance Co.*, 258 N. Y. 310. Consequently, on frequent occasions individual litigants have been permitted to submit in evidence, under Section 5, decrees pertaining to the nation-wide and general activities of the defendants, although the private litigant sues as to a particular or local situation. *William H. Rankin Company* v. *Associated Bill Posters of U. S.*, 42 F. (2d) 152, *cert. den.* 282 U. S. 864; *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 295 Fed. 98, *aff'd* 273 U. S. 359.

The relevancy of the *Paramount* determinations offered by petitioners does not depend upon whether the Findings and Conclusions offered are directly and precisely the matters complained of by petitioners. For there is much in the legislative history of Section 5 to suggest that a decree or judgment obtained in a government suit which adjudges the defendants to be guilty of a violation of the Sherman Anti-Trust Act is admissible in *any* subsequent private action against those defendants to establish the fact of such guilt. Thus, when Representative Floyd, who was in charge of the Clayton Bill, was asked to describe the scope of the precursor to Section 5 he declared:

> "If no fact in the Government suit related in any way to the party's case, there would still be this advantage:

It is a condemned corporation under the law, and he would not have to prove it was acting unlawfully in restraint of trade. The Government has already established that fact, and it is conclusive against the defendant corporation. All that the private litigant is required to do under that section as proposed in the bill is to introduce his decree, which is conclusive against the corporation, showing that the corporation has been condemned as an unlawful combination acting in restraint of trade, and then produce the facts to show that he has been damaged by it and to what extent" (51 *Cong. Rec.* Pt. X, p. 9490).

Similarly, upon the floor of the Senate, Senator Thomas construed Section 5 as follows:

"I quite agree * * * that a decision favorable to the Government, rendered in a case brought by the United States against violators of the antitrust acts, should be prima facie evidence in actions brought by individuals against the same concern to recover damages which they have suffered from that violation *or any other of similar character* * * *" (51 *Cong. Rec.* Pt. XIV, p. 13850). (Italics added.)

And in commenting upon the final version of the present Section 5, Representative Floyd observed:

"The Government of the United States acting on behalf of all its citizens, prosecutes a trust, convicts it * * * and the private litigant, injured by the unlawful acts of such trust, has nothing to do in order to recover the threefold damages except to prove the amount of damages and that the injury was done by this trust or corporation" (51 *Cong. Rec.* Pt. XIV, p. 16319).

The relevancy of the determinations offered by petitioners may be established by still another approach. Thus, even if those determinations are not precisely identical with the issues in the instant case, nevertheless, those determinations are relevant to establish the intent and motives of respondents' actions in connection with first-run distribution in Louisville. The purpose and intent of the respondents' actions are, of course, relevant to the petitioners' case in the proof of the conspiracy in restraint of trade alleged. *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 312; *American Tobacco Co.* v. *U. S.,* 328 U. S. 781, 809, 811; *Loewe* v. *Lawlor,* 208 U. S. 274, 297; *Moore* v. *New York Cotton Exchange,* 296 Fed. 61; *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.,* 57 F. (2d) 96; *Prairie Farmer Pub. Co.* v. *Indiana Farmer's G. Pub. Co.,* 88 F. (2d) 979. In the proof of such intent and motive petitioners were entitled to offer evidence of related acts and transactions other than those complained of in this suit for it has long been the rule in actions where proof of intent is essential that the suitor may introduce evidence of related circumstances other than those complained of to prove intent. *Wood* v. *United States,* 16 Pet. (U. S.) 342; *Butler* v. *Watkins,* 13 Wall. (U. S.) 456; *Jones* v. *United States,* 258 U. S. 40; *Exchange Bank* v. *Moss,* 149 Fed. 340; *Tooker* v. *Alston,* 159 Fed. 599, 604; *United States* v. *169 Bales Containing Wool,* 56 F. (2d) 736; *National Labor Relations Board* v. *National Steel Corp.,* 127 F. (2d) 776. In actions under the anti-trust laws, where intent is material, it has, without exception, been held that related transactions, not the immediate subject matter of the litigation, may be introduced to prove the intent to conspire to restrain trade illegally. The most recent affirmation of this doctrine appears in the decision of this Court in *Trade Comm'n* v. *Cement Institute,*

333 U. S. 683. In writing for the Court, Mr. Justice Douglas stated:

> "The Commission did not make its findings of post-1929 combination, in whole or in part, on the premise that any of the respondents' pre-1929 or NRA code activities were illegal. The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny" (333 U. S., 704-705).

See also:

> *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46; *United States* v. *Reading Company,* 253 U. S. 26, 43.

More particularly, in triple damage suits brought by private litigants, the suitor has been permitted to put into evidence related transactions not the subject matter of the lawsuit which tended to demonstrate the illegal intent or motive on the part of the defendants. In *Bausch Machine Tool Co.* v. *Aluminum Co.,* 72 F. (2d) 236, *cert. den.* 293 U. S. 589, it was held that the Trial Court improperly excluded, as collateral, evidence of the intent of the defendants.

> "Intent may well be more than a collateral matter *U. S.* v. *Corn Products Refining Co.* (D. C.), 234 F. 964, 1013. * * * The history of the organization throws light upon its illegality" (72 F. (2d), 239-240).

Similarly, in *Buckeye Powder Co.* v. *Hazard Powder Co.*, 205 Fed. 827, it was held that the plaintiff in private anti-trust action could introduce evidence of dealings by the defendant for a period not covered by the lawsuit. The *Paramount* determinations offered by petitioners were therefore relevant both as direct proof of the acts complained of and as proof of the intent of respondents to conspire in violation of the Anti-Trust Laws.

2. The materiality of the *Paramount* adjudications offered by petitioners.

The questions propounded by the jury at the conclusion of the trial indicated that the crucial issue so far as the jury was concerned was whether petitioners were "frozen out" pursuant to an intent to conspire in restraint of trade, or as the result of "good business judgment" (R. 2217a-2218a); these questions demonstrate beyond dispute the materiality of the *Paramount* Findings and Conclusions and the serious prejudice caused to petitioners by the exclusion of those determinations. In view of the questions propounded by the jury, the jury plainly would have been influenced by Findings and Conclusions obtained by the Government and affirmed by the Supreme Court of the United States which adjudicated the respondents guilty of the very restraints here complained of. When the jury returned after considerable deliberation and asked for additional instructions (R. 2217a-2218a) the Trial Court in its supplemental instructions charged the jury that the burden of proof was on the plaintiffs (R. 2224a), and used the time honored analogy of the drug store scales with the requirement that "the evidence on the plaintiff's side weighs down, tips the bar down on his side" (R. 2224a). The jury was further instructed that "if the bar remains even he [the plaintiff] has not sustained the burden of proof" (R. 2224a-2225a). If the Trial Court had admitted

in evidence the *Paramount* Findings and Conclusions and if the Trial Court, pursuant to Section 5, had charged that these Findings and Conclusions were *prima facie* evidence on the issue of conspiracy the jury would have commenced its deliberations with extremely vital evidence weighing on the petitioners' side of the scales. The failure of the Trial Court thus to admit the offered determinations was not only error but reversible error in that it kept from the jury evidence which, under all of the circumstances, would have resulted in a verdict for petitioners.

POINT II

The Court erred in failing to hold that the joint operation of the Brown Theatre by competing exhibitors was illegal *per se*.

Pursuant to written agreements* the Brown Theatre in Louisville was jointly operated by three competing Louisville exhibition interests. Foremost of these competitors was the Louisville Operating Co., Inc.** which operated the first run Loew's and United Artists Theatre in Louisville. The second competing exhibition interest was the Fourth Avenue Amusement Co., Inc.*** which operated two first-run theatres in Louisville (R. 895a). The third party interested in the operation of the Brown Theatre was the Broadway & Fourth Avenue Realty Co. (Exhibits 87 and 87-A, R. 2252a-2258a).

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* Exhibits 87 and 87-A (R. 2252a, 2258a).

** The stock of this corporation was jointly owned by Loew's Incorporated, a large affiliated exhibitor, and United Artists Theatre Circuit, Inc., the operator or owner of a large circuit of theatres in the United States, the affiliation of which, if any, is not clear.

*** This corporation is the operator of a large circuit of unaffiliated theatres in Kentucky and Indiana (R. 895a).

Two Specifications of Error are tendered this Court by the Petitioners. The second of the Errors assigned arises from the nature of the joint operation of the Brown Theatre hereinabove noted, the methods pursued in said operation, the privilege of move-over* uniformly extended to the operators of the Brown Theatre and the holdings of the Court below in respect to certain charges and refusals to charge as to these matters.

Heretofore, it has been unsuccessfully argued to the United States Court of Appeals for the Second Circuit that except for proof of damages the joint operation of the Brown Theatre by three competing exhibition interests (especially in light of the move-over privilege uniformly extended to it), entitled the petitioners to a directed verdict. If joint operation of a theatre by two or more competing exhibitors is illegal *per se,* then petitioners were entitled to a directed verdict; for there was ample demonstrated proof that three competing exhibitors did jointly operate the Brown Theatre in Louisville. The petitioners' objection to charges given and refused were predicated on such a theory; in other words, if petitioners were entitled to a directed verdict then surely they were entitled to charges justified by the legal theory on which a directed verdict rests. That the United States Court of Appeals for the Second Circuit so understood the petitioners' position and theory is clear:

> "It is the essence of plaintiffs' argument that 'but for the fact that a jury had to pass upon the question of damages', a directed verdict would have been required" (R. 832).

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* "A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre" (*U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 160, Note 13).

Judge Clark, writing for the Court of Appeals below, disagreed with the position of the petitioners and rejected the theory advanced by them.

> "This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. * * * The condemnation of joint interests in the decision in *U. S.* v. *Paramount Pictures, Inc.*, D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal * * * Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Anti-trust Act; and no such decision has ever been made" (R. 832).

The rejection of the petitioners' contention by the Court of Appeals is predicated on a misunderstanding of this Court's decision in *Paramount*. The Court of Appeals rested its affirmance as to this aspect of the instant appeal primarily on the theory that the Brown Theatre was jointly owned (rather than jointly *operated*) by competing exhibitors and that, in its view, no decision has ever been made whereby joint ownership of a theatre by competing exhibitors is illegal *per se*.

Petitioners assert that the decision of this Court in *Paramount* holds that joint *operation* (as distinguished from *ownership*) by two or more competing exhibitors is illegal *per se* and that such decision is dispositive of the error here assigned.

Joint Ownership and Joint Operation of a Theatre Are Distinguishable.

A. N. Hand, Circuit Judge, writing for a three judge District Court in *United States* v. *Paramount Pictures, Inc.,* 66 F. Supp. 323, treated joint *operation* of theatres and joint *ownership* of theatres separately in his opinion. At the outset the decision noted the claim of the Government that "the theatre owning defendants have combined with each other and with independent theatre owners by 'pooling' their theatres through *operating* agreements, leases, joint stock *ownership* of theatre *operating* corporations or through joint *ownership* of theatres in fee" (*United States* v. *Paramount Pictures, Inc.,* 66 F. Supp. 323, 350). The decision then proceeded to determine separately "the validity of these various means of joining interests". In the end, each of the various means of joining interests considered were proscribed.

On appeal to the United States Supreme Court the various means of joining interests were again considered separately. Indeed, the sub-heading under which such consideration was given made the distinction between all other forms of joint interests and joint ownership. It reads "(3) Pooling agreements; joint ownership" (***United States*** v. *Paramount Pictures, Inc.,* 334 U. S. 131, 149). Analysis of this section of the opinion of the Supreme Court reveals that each of the various means of joining interests (except one aspect of joint ownership, to-wit, where one of the proprietory interests was not an exhibitor) was held to be illegal *per se.* (*United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 149-153).

Joint Operation of a Theatre by Two Exhibitors Is Illegal *Per Se*.

In *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, it was held by the District Court:

> "These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant exhibitor reduces to a minimum opposition between its own and other theatres in the 'pool'. Cooperation, rather than competition, characterizes their operation, * * *
>
> Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, * * * but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the 'pool'." (66 F. Supp. 323, 351.)

Clearly the operation of the Brown Theatre pursuant to the agreements found in Exhibits 87 and 87A (R. 2252a, 2258a) were operations where "cooperation, rather than competition" were the prime characteristic. It was precisely this type of operation which the District Court held "to be in clear conflict with the Sherman Act".

The Supreme Court affirmed the inherent illegality of such arrangements and upheld that portion of the decree which ordered the dissolution of such agreements and the injunction of "any future arrangements of that character".

> "The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the

> exhibitor-defendants in the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine." (334 U. S. 131, 149.)

The Conclusions of Law of the District Court that the exhibitor defendants in *Paramount* had "unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures * * *, in violation of the Sherman Act by: * * * (a) *jointly operating* motion picture theatres with each other and with independents through operating agreements or profit sharing leases; * * *" (*United States* v. *Paramount Pictures, Inc.*, 70 F. Supp. 53, 72) was affirmed. (*United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 149-153.)

Thus it is apparent that at all levels of the *Paramount* litigation it was held that agreements for the *joint operation* of theatres by competing exhibitors are contrary to and in conflict with the law; such agreements are therefore illegal ***per se.***

That it was intended by the United States Supreme Court to render agreements for the *joint operation* of motion picture theatres by two or more competing exhibitors illegal *per se* is clear not only from an analysis of the *Paramount* litigation but from a judicial interpretation which this decision has received. In a recent decision made in the United States District Court for the District of Columbia, that Court, *sua sponte,* dismissed a complaint and a counterclaim, both of which were predicated on such an agreement. The District Court held:

> "What the plaintiffs seek here is to enforce the terms of an agreement which is part and parcel of what has been held by the Supreme Court to be an unlawful combination in restraint of trade and illegal, therefore, *per se*". *Kogud & Burka* v. *Stanley Company of*

America (in the United States District Court for the District of Columbia, Civil Action No. 2508-48 decided June 29, 1949 unreported).

It appears then, that aside from the decision here being appealed, the only other decision interpreting the holding of the United States Supreme Court in *Paramount* is squarely in conflict with the decision here being appealed.

Joint Ownership of a Theatre by Two or More Competitors Is Illegal *Per Se*.

It has heretofore been indicated (at p. 55, *supra*), that the District Court in originally determining the *Paramount* litigation held that the joining of interests by two or more exhibitors through the device of joint ownership of a theatre was proscribed.

> "Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor defendants, in some cases in conjunction with independents. * * * As these joint interests enable the major defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated" (66 F. Supp. 323, 351).

In accordance with the foregoing opinion the District Court concluded as a matter of law that exhibitor defendants "have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures * * *, in violation of the Sherman Act by: * * * (b) jointly *owning* motion picture theatres with each other and with independents * * *;" (70 F. Supp. 53, 72).

When this phase of the problem of joint interests was presented to the United States Supreme Court it approved and affirmed the Conclusion of Law but directed that cer-

tain additional inquiries be made (as hereinafter noted). The approval is found in the following language:

> "* * *, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraint of trade that the exhibitor defendants have inflicted on the industry" (334 U. S. 131, 153).

Where, however, one of the parties participating in the joint ownership of a theatre was simply an investor as distinguished from an exhibitor or where the share in the joint ownership was "*de minimis*", it was held that such joint ownership was not necessarily in conflict with the Sherman Act and therefore not inherently illegal. As a consequence this Court directed the District Court to make further inquiry to determine in what particular circumstances joint ownership was not illegal *per se* (334 U. S. 131, 153).

The common denominator of the joint exhibition interests which have been declared inherently illegal is the fact that those whose interests are joined are both exhibitors. *Paramount* establishes that every alliance—whether in the form of joint ownership or joint operation—in the exhibition of motion pictures is illegal *per se where the allies are actual or potential competing exhibitors.* The operation of the Brown Theatre by the Louisville Operating Company, Inc., Fourth Avenue Amusement Company and the Brown and Fourth Avenue Realty Company has this common denominator; all of the parties to it were competing exhibitors. The contract which solemnized this relationship is a prime example of an operation characterized by "co-operation rather than competition". Here, if ever, is revealed an operation, the effect of which was to "ally two

or more theatres of different ownership into coalition for the nullification of competition between them". Here is an arrangement wherein the operators of three competing first-run theatres were to share in the profits netted by the operation of a fourth competing theatre. Without more such an arrangement constitutes one of those restraints of trade concerning which the United States Supreme Court has said "clearer restraints of trade are difficult to imagine."

If additional, uncontradicted, demonstrated evidence is needed to permit a judgment that the arrangement pursuant to which the Brown Theatre was operated was illegal *per se,* it is to be found in abundance.

For example, the United States District Court in *Paramount* proclaimed that the inherent illegality of joint operation of theatres "is certain where some of the parties are of major stature in the movie industry and have otherwise imposed unlawful restraints upon it * * * *" *United States* v. *Paramount Pictures, Inc.,* 66 F. Supp. 323. As pointed out above (*supra,* p. 3) the Louisville Operating Company, Inc., was itself an organization equally owned by Loew's, Incorporated and United Artists Theatre Circuit Company, both of which are of major stature in the industry and it was the Louisville Operating Co. Inc., that operated the Loew's and United Artists Theatres in Louisville as a first-run motion picture theatre in competition with the Brown Theatre, the policies of which it helped to determine and the profits of which it shared.

In addition to the major stature in the movie industry of one of the parties to the Brown Theatre operation, an examination of the contract for that operation reveals the existence of the following provision:

> "The same admission price shall be charged [in the Brown Theatre]" (Plaintiffs' Exhibit 87, par. 6; R. 2254a).

No clearer price fixing commitment could be written. This horizontal price fixing arrangement between exhibitors was known to and acquiesced in by the respondents herein in their capacity as distributors.

Nor is this the end of the additional restraints which confirm the inherent illegality of the joint operation. Hard upon the execution of the agreement by which the Brown operation was undertaken, each of the respondent distributors herein set up a move-over run with exactly the same film rentals as its competitors and each did this with the knowledge that the others were doing so (R. 916a-919a). The testimony on the subject plainly proved this. Mr. Dolle, a principal of the Fourth Avenue Amusement Company, testified that he "bought move-over pictures at the Brown Theatre" from each of the respondent distributors.

> "Q. And you told them that the theatre was being operated under an arrangement with Loews? A. Yes they all knew that.
>
> Q. You told them so, didn't you? A. Yes, sir" (R. 918a-919a).

Mr. Dolle further testified that each of the distributors knew what the film rentals were that its competitors were getting out of the Brown Theatre operation (R. 916a).

Moreover, it is clear that there was a "general understanding" whereby all the respondent distributors agreed to a formula to be used to determine which pictures would be moved over from the theatres of the Louisville Operating Co. Inc. and the Fourth Avenue Amusement Co. to the Brown Theatre. Mr. Dolle testified:

> "A. I can say it was oral—I would say it was a general understanding between the distributors that were furnishing Loews and our theatres and ourselves that

the higher gross pictures would move over. That the higher gross pictures would move over.

Q. That was a general understanding among all of you? A. Yes, sir" (R. 925a-926a).

The District Court in the *Paramount* litigation found that numerous competitive advantages, including the granting of move-overs, were included in contracts with large circuits of theatres. The District Court held that the inclusion of such provisions constituted an unreasonable discrimination against small competitors and that it violated the anti-trust laws. *United States* v. *Paramount Pictures, Inc.*, 66 Fed. Supp. 323, 352. The Court went further and held that it really made no difference that such provisions were individually negotiated for. Acquiescence to the unreasonable restraint of move-over, as well as its creation, violated the Sherman Act (*United States* v. *Paramount Pictures, Inc.*, 66 Fed. Supp. 323, 352).

In considering this phase of the *Paramount* litigation, the United States Supreme Court affirmed the Conclusion whereby the District Court held that the granting of move-over runs was an unlawful discrimination and a violation of the Sherman Anti-Trust Act.

"We concur in the conclusion that these discriminatory practices are included amongst the restraints of trade which the Sherman Act condemns" (334 U. S., 160).

Taking the clear demonstrated proof of joint operation by exhibitors which is illegal *per se* together with the price fixing provided for by agreement, and the uniform discriminatory move-over granted to the operators of the Brown Theatre, there can be no doubt that in the instant case the evidence was conclusive upon the Trial Court that the arrangement for the operation of the Brown Theatre was

inherently illegal and being so, but for the proof of damages, there should have been a directed verdict.

The Error in the Charges and the Refusals to Charge.

In the absence of the directed verdict on the issue of liability which was requested but denied (R. 2116a), charges predicated on the inherent illegality of joint operation were properly requested and improperly denied. Moreover, the charges given failed to defer to the pronouncements of this Court, whereby joint operation of theatres was held to be illegal *per se*.

The major error in the charge is to be found in the following language:

> "Illegality would only arise if you found from the evidence that the plan and method of operating the Brown Theatre as a move-over, * * * was part of a plan or scheme among certain of the defendants and certain operators of first-run theatres in Louisville to monopolize the showing of first-run pictures or to restrain or control the business of exhibiting first-run pictures in Louisville" (R. 2169a).

This charge was approved by the United States Court of Appeals for the Second Circuit. The decision of the latter Appellate Court states:

> "Likewise the joint operation of the Brown Theatre by one independent exhibitor and a subsidiary of one of the defendants (Loews) was a type of activity which would not be unlawful unless a conspiracy to monopolize or restrain commerce by means of that activity was found by the jury to exist as to some of the defendants in the present action." (Fifth and Walnut, Incorporated v. Loews Incorporated) (R. 832).)

It is not true that any such prerequisite to a finding of illegality was necessary. If the joint operation of the Brown Theatre was illegal *per se*, the foregoing thesis was wrong. It would be difficult to imagine a clearer conflict than that which exists between the pronouncement of the United States Court of Appeals for the Second Circuit in the instant case and the pronouncement of the United States Supreme Court in *Paramount*.

In requesting charges that the agreements for the operation of the Brown Theatre as a move-over theatre (Exhibits 87 and 87-A) were "direct evidence and not circumstantial evidence of an illegal conspiracy" the petitioners were requesting far less than was their due. For if the contracts for the operation of the Brown Theatre were tainted sufficiently to support a directed verdict, then clearly they were tainted sufficiently to request that they be regarded as direct rather than circumstantial evidence.

Failure to charge as requested, together with the charges as given, creates a clear conflict between the law as given by the United States Supreme Court and that given by the Trial Court and approved by the Court of Appeals. That this error was prejudicial is evident. Had the jury been instructed as a matter of law that the joint operation of the Brown Theatre by competing exhibitors, together with the price fixing and the uniform move-over privilege extended to the operators of the Brown Theatre was illegal *per se*, a verdict in favor of the respondents would have had to be reversed as against law.

CONCLUSION

For all the reasons herein stated, the petition should be granted and a writ of certiorari issued to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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